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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

OCCIDENTAL LIFE INSURANCE COMPANY, a Corporation,
Petitioner,

vs.

SOPHIE EILER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
and
SUPPORTING BRIEF AND ARGUMENT.

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MAY IT PLEASE THE COURT:

The petition of Occidental Life Insurance Company, a corporation, respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

In this action, originally instituted against petitioner in the state court of Missouri (R. p. 6) and subsequently removed to the federal court (R. p. 10), the respondent sought to recover of petitioner the sum of $3,500 under the double indemnity or accidental death benefit of a policy of life insurance for $5,000 issued on January 31,

1921, by the Guaranty Life Insurance Company (later reinsured by petitioner) to and upon the life of Henry Eiler, in which respondent was the beneficiary, together with a penalty of $350 and a reasonable attorney's fee, on the ground that petitioner's refusal to pay was vexatious.

Following the insured's death, which was the result of suicide (R. p. 169), the Guaranty Life Insurance Company paid the respondent, the beneficiary of the policy, the sum of $5,000 under the life insurance benefit of the policy, no claim having then been made under the double indemnity benefit of the policy (R. p. 144). About a year later, however, the respondent did make claim under the double indemnity benefit of the policy on the ground that the insured was insane when he committed suicide (R. p. 51). Following that claim, petitioner, through its agent at St. Louis, Missouri, entered into negotiations with respondent for a settlement of that claim, with the result that respondent agreed to accept $1,500 in full settlement of her claim under that benefit, which amount was paid to her and for which she executed a written release of all claims under the double indemnity benefit of the policy (R. pp. 33, 58-60, 85).

About a year later the respondent, through her counsel, made demand upon petitioner for the additional sum of $3,500 under the double indemnity benefit, and upon petitioner's refusal to pay the same, respondent filed this suit, in which she alleged that the insured's death was the result of an insane suicide; that petitioner had previously paid respondent the sum of $1,500 under the double indemnity benefit of the policy, but that it had vexatiously refused to pay the additional sum of $3,500 alleged to be due thereunder.

Petitioner in its answer (R. p. 16) pleaded in bar of the action the release by respondent of all claims under the double indemnity benefit of the policy in consideration of the payment to her of the sum of $1,500; denied that the

insured was insane when he committed suicide, and denied that it had vexatiously refused to pay respondent the additional sum of $3,500 claimed to be owing under that benefit.

To this answer respondent filed a reply (R. p. 20), in which she alleged that when this release was executed, there was no bona fide dispute or controversy between the parties concerning the defendant's liability under the double indemnity benefit of the policy, and that the release was procured through false and fraudulent representations on the part of petitioner's agent.

There being no allegation either in the petition or in the reply that respondent had returned or offered to return or had tendered into court the sum of $1,500 paid to her by petitioner for her release of all claims under the double indemnity benefit of the policy, petitioner filed a motion in the District Court for judgment on the pleadings on the ground that the return to petitioner of this sum of $1,500 was a condition precedent to respondent's right to maintain an action against petitioner under the double indemnity benefit of the policy (R. p. 26). That motion was overruled by the District Court (R. p. 27). Petitioner also objected at the trial to the introduction of any evidence by respondent in avoidance of the release because no tender of the return of the sum of $1,500 paid for this release had been made to petitioner, which objection was also overruled by the District Court (R. p. 36).

At the trial respondent produced evidence that the insured was insane prior to the time he killed himself. However, the respondent introduced in evidence the following suicide note left by the insured:

> "To nervous Could not stand it any longer Nobody's fault Bury me at Mattese cemetery Father Schlattmann—Fendler undertaker Did not take time to wash" (R. p. 49).

There was a finding and judgment by the District Court in favor of respondent for the sum of $3,500, and interest thereon of $877.37, together with the sum of $350 as a penalty and $1,000 as an attorney's fee for the vexatious refusal of the defendant to pay the additional sum of $3,500 under the double indemnity benefit of the policy (R. p. 190).

Appeal to Court of Appeals.

On petitioner's appeal from that judgment the Court of Appeals held that under the Missouri law the release of all claims under the double indemnity benefit of the policy was void for lack of a bona fide dispute or controversy between the parties; that the return of the sum of $1,500 paid by petitioner to respondent for that release was not a condition precedent to the right of respondent to maintain an action against petitioner on the double indemnity benefit of the policy; that the suicide note left by the insured was insufficient to raise any reasonable doubt as to his insanity at the time he killed himself and that the facts brought the case within the operation of Sec. 6040, R. S. Mo. 1939, which authorizes the allowance of a 10 per cent penalty and reasonable attorney's fee against the insurer if it vexatiously refuses to pay the amount adjudged to be due and owing by it under a policy. In addition, the Court of Appeals also held that petitioner's appeal from the judgment of the District Court was vexatious and had been taken merely for the purpose of delay, and for that reason and on the authority of Sec. 1230, R. S. Mo. 1939, it awarded respondent additional damages in the sum of 10 per cent of the amount of the judgment of the District Court (R. 196-209).

Following a petition for rehearing (R. p. 211), in which petitioner contended that the Missouri Legislature was without authority to prescribe a penalty for a vexatious

appeal from a judgment of a District Court of the United States, the Court of Appeals in a per curiam opinion (R. p. 223) held that if the imposition of that penalty was not warranted by the Missouri statute, it was justified by Sec. 878, 28 U. S. C. A., and Rule 31 of the Court of Appeals, which provides that if it shall appear to the Court that an appeal is taken merely for delay, damages at a rate not exceeding 10 per cent shall be awarded upon the amount of the judgment or decree of the District Court.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The holding of the Court of Appeals that respondent's release of all claims under the double indemnity benefit of the policy was void because of the lack of a bona fide dispute or controversy, notwithstanding the issue of the insured's insanity when he committed suicide, would have been one for the determination of the jury in an action to recover under the double indemnity benefit of the policy, and that repayment of the consideration paid for that release was not a condition precedent to the maintenance of this action, involves an important question of local (Missouri) law and said holding is either in conflict with the applicable decisions of the Missouri courts or is probably untenable under the Missouri law as yet unannounced by the appellate courts of that state.

2. The holding of the Court of Appeals that petitioner's refusal to pay the claim sued on was vexatious and that the imposition by the District Court of a penalty of $350 and an attorney's fee of $1,000 was proper under Sec. 6040, R. S. Mo. 1939, involves an important question of local law which is in conflict with the applicable decisions of the appellate courts of Missouri.

3. The holding of the Court of Appeals that petitioner's appeal from the judgment of the District Court was vexa-

tious and was taken merely for the purposes of delay and the imposition therefore (either under Sec. 1230, R. S. Mo. 1939, or under its Rule 31) of an additional 10 per cent of the amount of the judgment of the District Court, involves an important question of federal law or practice which is contrary to the previous holding of this Court in McKee v. Rains, 10 Wall. 22, 26, 19 L. Ed. 860, 862, if the holding of the Court of Appeals is predicated on its Rule 31, and which renders Section 1230, R. S. Mo. 1939, unconstitutional, if the holding is predicated on that statute.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals, Eighth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in case numbered 11,990 on its docket and entitled "Occidental Life Insurance Company, a corporation, Appellant, v. Sophie Eiler, Appellee," and that the said judgment of the Circuit Court of Appeals, Eighth Circuit, be reversed by this Honorable Court, and that your petitioner may have such relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

OCCIDENTAL LIFE INSURANCE CO.,
a Corporation,

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